In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 420

DENNIS HENRY LORAINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury in the Central District of California of conspiracy to possess and conceal counterfeit money (count 1), and substantive offenses of possession and concealment of $376,200 in counterfeit (count 2), and transfer of counterfeit bills to one Terry (count 3) (18 U.S.C. 472, 473). On March 11, 1966, petitioner was sentenced to five years' imprisonment and fined $10,000 on Count 1, and to six years' imprisonment on Count 3, to run concurrently with a six-year sentence on Count 2 (R. 34).

The judgment of the court of appeals affirming the conviction was entered on June 4, 1968 (396 F. 2d 335). A petition for rehearing was denied on July 18, 1968. The petition for a writ of certiorari, filed on August 19, 1968, is out of time under Rule 22–2 of the Rules of this Court. In all events, there is no occasion for further review.

319-858—68

1. The evidence is summarized in detail in the opinion of the court of appeals. Petitioner's challenge to its sufficiency presents no issue warranting review by this Court.

In late spring 1965, petitioner and others attempted to obtain large amounts of counterfeit money to help one Roe recover from financial difficulties (R.T. 1179–1182, 1185–1186, 1210, 1227). In July, 1965, Terry told petitioner that $500,000 in counterfeit one hundred-dollar bills could be obtained on short notice through Lee, an attorney (R.T. 2094–2095). On July 26, in accordance with petitioner's instructions, Terry met Lee at the Los Angeles airport and took him to a house where petitioner was staying (R.T. 1820, 1823). Lee brought a briefcase from his car into petitioner's bedroom (R.T. 1824–1825). While petitioner was in an adjoining room, Terry observed a number of hundred-dollar bills in Lee's open briefcase (R.T. 1825–1832). Later that day, petitioner told Terry that Roe, who was then in Switzerland, wanted to see Terry regarding the film "Blues for Mr. Charley" (R.T. 1837–1839). Petitioner also asked Terry to do him a great favor by delivering some papers to Roe (R.T. 1841). Lee and Terry then went to Terry's motel room (R.T. 1842–1843). While Terry was packing, Lee handed him three packages, each the size of a large book, light in weight, and tightly wrapped in newspaper (R.T. 1843–1845). Terry put the packages in his overnight bag and left that evening by plane for Geneva (R.T. 1846–1848).

On the same day (July 26) petitioner told Randall that Terry was carrying about $500,000 in counterfeit

one hundred-dollar bills to Roe in Switzerland (R.T. 1387, 1392). Petitioner asked Randall to telephone Roe and tell him that Terry was on his way, that there would be no charge for the counterfeit which was defective, that he should pay Terry $5,000 in genuine bills as a fee for delivering the counterfeit, and that after he had cashed the counterfeit money he was to send petitioner $55,000 to cover the balance due to the suppliers of the counterfeit (R.T. 1392–1393, 2108–2109). Randall telephoned that information to Roe. He told Roe that petitioner had rejected $200,000 of the counterfeit money as defective, but that Terry would deliver $300,000 in well-printed counterfeit, as well as $75,000 of the defective counterfeit in case Roe could "do anything with it" (R.T. 2111–2112).

On the morning of July 28, Terry arrived at Roe's office in Lausanne, Switzerland, and told Roe that he had been instructed to give him the contents of his briefcase (R.T. 2118, 2122–2123). Terry placed the three packages on the table and stepped out of the office for a moment. When Terry returned, Roe was examining a large pile of one hundred-dollar bills (R.T. 1863–1865, 2127–2128). Terry told Roe that the counterfeiting was done in a great hurry at petitioner's request, that the ink had not dried before the packages were put together, that the paper was not the best quality, and that the numbers on some of the bills were blurred (R.T. 2123). Terry informed Roe that Lee had advised not to put the money in circulation in Europe; Lee and petitioner apparently understood that the money was to be posted as collateral to secure loans (R.T. 2124, 1210). In accord-

ance with petitioner's instructions, Roe paid Terry $5,000 in genuine money (R.T. 2129).

Thereafter Roe exchanged $5,900 in counterfeit bills for Swiss Francs at four banks in Geneva; a cashier at a fifth bank, however, refused to exchange a number of bills because they were counterfeit (R.T. 2133–2138). Roe then telephoned petitioner in Los Angeles that he could not send the $55,000 which petitioner had requested. Petitioner replied that this would cause him great difficulty with his suppliers (R.T. 2139, 2142).

On the basis of this evidence, the jury was justified in finding petitioner guilty on all counts.

2. At the close of the government's case petitioner's counsel joined in a motion to dismiss the indictment, on the ground that the government had suppressed evidence which would have affected the credibility of government witnesses before the grand jury. Counsel alleged that the government failed to reveal to the grand jury that witness Desatnick had a criminal record and was then under indictment in other cases; that witness McKee had been charged with embezzling $85,000 from Cadco Company of Great Britain; and that witness Randall had been permanently enjoined by the State of New York from selling or dealing in securities (R.T. 2576–2578). The court denied the motion.

Contrary to petitioner's contention, the decision below is not in conflict with *Brady* v. *Maryland*, 373 U.S. 83, and *Giles* v. *Maryland*, 386 U.S. 66. Those cases dealt only with information which must be made available to a defendant for trial, where his

guilt or innocence is ultimately to be determined. A grand jury presentation, on the other hand, is a preliminary proceeding for the purpose of determining only whether an accused should be held for trial. It is unnecessary at that stage to delve into all collateral matters which may possibly affect the credibility of government witnesses.[1] The court below correctly held that the failure to present this impeachment material, which was available to petitioner at trial, to the grand jury did not invalidate the indictment.

3. In a telephone conversation with Randall, Roe said that petitioner had promised to get him a letter of credit for $150,000 from a bank in Jackson, Mississippi (R.T. 1337–1338). Randall, a government witness, testified that he told Roe that if petitioner had acquired the charter of a bank, it was a non-existent bank, and that a letter of credit on that bank would have no validity (R.T. 1339). Randall also testified that when he talked to petitioner about the possibility of Roe committing suicide, he told petitioner, "I think you are a blackguard" (R.T. 1342). Petitioner's counsel moved to strike that remark and asked for a mistrial (R.T. 1342, 1352). The court refused to grant a mistrial, and instructed the jury as follows (R.T. 1372–1374):

[1] Although petitioner argues here that the government should have impeached its own witnesses at the grand jury proceeding, when the government attempted to place the criminal record of one witness before the trial jury, petitioner's counsel objected on the ground that the government was attempting to impeach its own witness. The objection was sustained (R.T. 835–837, 852).

> * * * obviously no defendant in this case is on trial here for any offense or any wrongdoing save the charges against them made by the indictment * * *.
>
> Nothing which has been introduced in evidence and no testimony, is before this jury which in anywise indicates * * * that there was any non-existent bank, or that any defendant in any way held out to anyone or did anything about any non-existent bank in Mississippi or elsewhere.
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> I say that because it is my impression that what this witness [Randall] testified to * * * indicates that he had the opinion of the defendant Loraine, that if the defendant Loraine had referred to a letter of credit it would be upon a non-existent bank. He was not testifying that there was in fact use of a non-existent bank. He was saying what he thought about the defendant Loraine.
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> * * * * * *
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> Similarly, when this witness, in reciting a conversation with Mr. Loraine, said he told Mr. Loraine, or words to the effect, "You are a blackguard." That doesn't prove anything except that according to this witness that is what was said during that conversation by this witness.

This minor incident should not be magnified beyond its significance in a long and hotly contested trial. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239–240. The court's instructions fully cured any prejudice which may have resulted from that testimony.

4. During the trial, petitioner's counsel joined in co-defendant Friedland's motion for a mistrial on the ground that a local newspaper article reported that Friedland's wife had testified as to misconduct on the part of jurors. When questioned by the trial court, however, none of the jurors indicated that he had read a newspaper or listened to a broadcast about the trial, and the motion was denied (R.T. 180–187). At the close of the government's case, petitioner's counsel joined in renewing the prior motion for a mistrial, and in a new motion to dismiss the indictment on the ground that there had been "a continuation of publicity and news reporting which is not accurate, truthful, and does not fairly reflect the court proceedings, but contains a mass of inaccurate statements" (R.T. 2591). The court also denied these motions (R.T. 2592).

Petitioner made no showing that the jurors saw the publicity, that it related to him, that it was inaccurate and untruthful, or that he was prejudiced in any way. In these circumstances, the trial court properly denied the motions for mistrial. The situation here is totally unlike that in *Sheppard* v. *Maxwell*, 384 U.S. 333, and *Estes* v. *Texas*, 381 U.S. 532, where there was massive newspaper publicity as well as radio and television coverage, and the jurors admitted their exposure to this publicity.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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